

SUPERIOR COURT  
DOCKET NO. AROCD-CR-19-00129  
19-00130  
19-00131  
19-00132  
19-00133  
19-00134

VS

## DECISION

STATE OF MAINE  
Respondent

Pending before the court is Dennis Winchester's (hereafter Winchester) six Petitions for Post-Conviction Review. Hearing on the petitions was held on June 8, 2021. Testimony was received from Winchester, Attorney Prendergast, and Attorney Tebbetts. Also admitted into evidence were the following exhibits:

Plt.'s Ex. 6- Affidavit and Request for Search Warrant;

Plt.'s Ex. 7- Appellant's Brief;

Plt.'s Ex. 8- Brief of Appellee;

Plt.'s Ex. 9- Appendix;

Plt.'s Ex. 10- Law Court Decision, 2018 ME 142;

Plt.'s Ex. 11- Reply Brief; and

Def.'s Ex. 1- Letter Advising Client, dated December 3, 2017, from Attorney Tebbetts to Winchester.

With agreement of the parties, the record also includes, and the court has considered, the docket sheets and file contents of the underlying criminal charges Winchester was facing in 2014 and 2015, namely CARSC- CR: 2014-056; 2014-147; 2014-267; 2014-515; 2014-545; 2014-547; 2015- 003; and 2015- 067.<sup>1</sup> (The contents of those files are not organized by page numbers, so any references will be limited to identification of the document and docket number.)

## PROCEDURAL AND BACKGROUND FACTS

In 2014 and 2015, the State initiated eight prosecutions against Winchester for a spree of burglary and theft allegations. The sheer volume and number of pending cases, along with the number of attorneys involved, necessitates a review of all these cases to assess the effectiveness of counsel. CARSC- CR- 2014-056 was dismissed due to the passing and death of the victim of the crime. And CARSC- 2014- 147 proceeded to trial ahead of the other prosecutions and is not part of Winchester's claims in his petition. However, the timing, background and outcome of that

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<sup>1</sup> CARSC-Cr- 2014-056 was dismissed due to the death of the alleged victim.

case is relevant to an understanding of the procedural posture and outcome of the cases which are the subject of Winchester's petition and his claims.

The indictments and charges which Winchester includes in his petition are summarized, to wit:

1. CR-2014-267 (PCR-19-133): Count 1-Burglary, Class C; Count 2-Theft, Class D
2. CR-2014-515 (PCR-19-130): Count 2-Theft, Class C; Count 3-VCR, Class E; Count 4-Possession of a Firearm by a Prohibited Person, Class C; Count 5- Receiving Stolen Property, Class C
3. CR-2014-545 (PCR-19-134): Count 1-Theft, Class C; Count 2-VCR, Class E
4. CR-2014-547 (PCR-19- 131): Count 1- Burglary, Class B; Count 2-Theft, Class C
5. CR-2015-003 (PCR-19-132): Count 1-Theft, Class C; Count 2- Theft, Class C; Count 3-Criminal Mischief, Class D; Count 4-Criminal Mischief- Class D; Count 5- Burglary-Class B; Count 6- Theft, Class C; Count 7-Criminal Mischief, Class D; Count 8- Theft, Class C; Count 9- Criminal Mischief, Class D; Count 10-Criminal Mischief-Class D
6. CR-2015-67 (PCR-19-129): Count 1-Theft, Class C; Count 2-Burglary of a Motor Vehicle, Class D.

Winchester's complaints of ineffectiveness target all of the attorneys who represented him at one time or another. So, the court will briefly set forth the timeline of each attorney's representation as gleaned from the dockets sheets for each case. Winchester was initially represented on seven of the eight cases by Attorney Jon Plourde.<sup>2</sup> In April, 2015, Attorney Plourde withdrew and on April 28, 2015, Attorney Neal Prendergast was appointed on all of the

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<sup>2</sup> The last case filed by the State was CR-2015-067, which was commenced with an indictment filed on March 6, 2015. Attorney Prendergast was the first attorney appointed on this docket.

cases. In February, 2017, and again in March, 2017 Attorney Prendergast moved to withdraw and in April, 2017 Attorney Chris Coleman was appointed. Attorney Coleman moved to withdraw in late June, 2017 and his associate, Attorney Jack Tebbetts, was appointed. Attorney Tebbetts represented Winchester through trial on CARSC- CR- 2014-545 (PCR-19-134) held on November 9, 2017, as well as through all remaining proceedings including appeal on all remaining dockets.

The first set of charges to go to trial, which are not part of this petition, arose through CARSC- CR- 2014-147, and included a charge of Burglary, Class C. That case was initiated by a complaint filed March 31, 2014, and an indictment filed May 9, 2014. Attorney Plourde was appointed to represent Winchester on March 31, 2014. No motions to suppress were filed on that case. Trial was held in November, 2014 which resulted in a mistrial. A second trial was held in January, 2015 and Winchester was found guilty. At a sentencing hearing held on February 18, 2015, Winchester was sentenced to 5 years in prison, with all but three (3) years suspended. The significance of this fact is Winchester was largely in execution of and serving that sentence while the remaining charges were working through the docket. Winchester testified he was released from prison in May, 2017, but was held without bail at the Aroostook County jail due a no-bail order entered on November 10, 2014 on a motion to revoke bail filed in CR- 2014-267. It was shortly after the trial and sentencing on CARSC-CR- 2014-147 that Attorney Plourde withdrew from all of the remaining charges.

Soon after Attorney Plourde withdrew, in a handwritten letter dated April 12, 2015, Winchester wrote to the court inquiring whether Attorney Plourde had filed a motion to suppress and a motion for a speedy trial on dockets CR-14-515, CR-14-545, CR-14-546, CR-14-547 and CR-15-003. (Plt.'s Ex. 1). A clerk with initials "CMH" responded in a handwritten notation at

the bottom the letter “*Mr. Plourde has in fact filed the motions. We are still trying to find you an attorney.*” Id. That response by the clerk was only partially correct, in that motions to suppress had only been filed in dockets CR- 2014-515 and CR- 2015-003, filed on March 16, 2015. And no motions for a speedy trial had been filed in any of the dockets. (See docket sheets on each case). Attorney Prendergast was appointed on April 28, 2015 on all of the remaining dockets.

On August 3, 2015, Attorney Prendergast filed a motion to suppress evidence on all of the remaining dockets. The motion sought to suppress all of the evidence seized during November and December 2014 searches, and also sought discovery sanctions for the State’s return of items to individuals law enforcement confirmed were the owners. See *State v. Winchester*, 2018 ME 142, ¶ 9. Winchester alleged his due process rights were violated by the State’s failure to preserve exculpatory evidence by returning many items of property to the purported owners and that the searches by law enforcement exceeded the scope of the warrants. Hearing was held on all of the pending motions on July 20, 2016, but the hearing focused primarily on the due process issues associated with returning the items of property to the owners. On October 27, 2016 the court issued decisions on each docket denying the motions on due process grounds. See Order on Motion to Suppress on each docket, dated October 27, 2016. In those orders the court did not address the issue of whether law enforcement had exceeded the scope of the search warrants.<sup>3</sup>

All of Winchester’s case were set for docket call on February 27, 2017. (See docket sheets for each case). But on February 27, 2017 Winchester filed motions for reconsideration and

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<sup>3</sup> In the decisions issued August 23, 2017, the court made clear what had been addressed orally at prior hearings, that the issue of the searches exceeding the scope of the search warrants had been raised by prior counsel (Attorney Plourde) in *generic* motions to suppress filed on two of Winchester’s cases, and was not being addressed in the orders issued October 27, 2016. The October 27 orders focused on the due process issues related to returning the property to the owners. Whether the search exceeded the scope of the warrants was ultimately addressed in subsequent orders.

motions in limine on all remaining dockets. The court issued handwritten orders denying the motion on February 27, 2017, briefly indicating the items seized were either in plain view or obtained with consent.

Of interest is a Supplemental Order issued by the court on March 1, 2017 on docket CR-2015-067 which related to events that transpired at the February 27, 2017 docket call. (See Supplemental Order dated March 1, 2017). According to that order, the court was attempting to prioritize Winchester's cases for trial, and it appears this docket was to be scheduled for trial in March, 2017. At the docket call held February 27, 2017, the court learned Winchester had "fired" Attorney Prendergast because Winchester wanted counsel to raise issues at trial that counsel believed were irrelevant. *Id.* In his order, Justice Hunter wrote: *After indicating to the Defendant that lawyers have certain professional obligations that among other things require court approval before withdrawing in a case and after indicating that the court was not going to allow the Defendant to attempt to control the court's docket as it appeared to the court that he was trying to do, the court engaged the Defendant on his particular issues.*" (Supplemental Order, p. 1). The order then describes the efforts Justice Hunter took to explain to Winchester his view of the search warrant issues, and that as for the seized evidence in the case exposed for trial, CR-2015-067, there were no search warrant issues as the evidence had either been in plain view or seized with consent, and that the court would not allow Winchester to pursue search warrant issues at trial. Justice Hunter also wrote that he would *"not allow the Defendant to frustrate the State's effort to bring this old case to trial by 'firing' his attorney at such a late stage.."* *Id.* Attorney Hunter further ordered that Attorney Prendergast would remain Winchester's counsel.

Due to a snow storm, none of Winchester's cases were scheduled for trial in March, 2017. See Docket Record on CR-2015-067, notation made March 14, 2017 "Jury trial not held

on 3/14/2017”). By a motion dated March 17, 2017, Attorney Prendergast again moved to withdraw, indicating in the motion “*Defendant was further adamant that current counsel could not and would not be representing him in the matter which is set for trial during March, CR-15-067.*” Justice Hunter granted the motion, and on April 12, 2017 Attorney Coleman was appointed.

Upon the appointment of Attorney Coleman, the search warrant issue was again raised by Winchester. By a motion filed July 5, 2017, Winchester moved for further findings of fact and conclusions of law regarding the court’s October 27, 2016 order, specifically asserting the warrants did not describe with particularity the items seized. The court granted the request.

From reviewing the files of the remaining dockets, it does not appear counsel submitted any additional arguments or proposed facts. However, the court still issued additional orders on August 23, 2017, again denying the motions for reconsideration. In short, in the February 27, 2017 and August 23, 2017 orders issued on each docket, the court explained that the items seized were either in plain view, properly identified within the search warrant, or seized with consent, and accordingly denied the motions for reconsideration on each docket.

Just prior to the court’s issuing the August 23, 2017 orders, Attorney Coleman moved to withdraw from all of Winchester’s cases. The motion indicated Attorney Coleman had accepted employment outside of Aroostook County.<sup>4</sup> The motion was granted and Attorney Coleman’s associate from his former office, Attorney Tebbetts, was appointed.

On November 9, 2017 a jury trial was held on CR-2014-545 on the indictment charging Winchester with a Class C theft of tires and rims and for violation of condition of release. He was found guilty on both counts. Sentencing was continued to a later date.

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<sup>4</sup> It is generally known Attorney Coleman accepted a position with the Kennebec County District Attorneys Office.

Winchester was then scheduled for trial on CR-2014-267, which also was a burglary and theft charge, with trial to begin on December 6, 2017. Prior to that trial, Attorney Tebbetts met with Winchester in the county jail and explained to him, orally and in writing, the risks of proceeding to trial, particularly related to DNA evidence and the sentencing implications if found guilty. (See Def.'s Ex. 1) On December 6, 2017, Winchester agreed to the offer his attorney had negotiated with the State and entered conditional pleas of no contest on all remaining charges in the five remaining indictments, preserving for appeal the issues of lack of speedy trial, failure to preserve potentially exculpatory evidence, and the lack of particularity of the search warrants. He was sentenced by the court as negotiated. On CR-2014-545, the matter he had been found guilty on by a jury on November 9, 2017, he was sentenced to five years on the Class C Theft, and 180 days on the VCR. On the five indictments he entered conditional pleas of no-contest, Winchester was sentenced to five years on the felony charges, all concurrent with one another, but consecutive to the five year sentence on the felony theft charge on which he was found guilty at trial. Winchester timely appealed. On appeal, Winchester argued that by returning property to its purported owners, the State failed to preserve exculpatory evidence, and that the search warrants were vague. Argument of a speedy trial violation was not made in the appeal. On September 13, 2018 the Law Court denied Winchester's appeal and affirmed the judgment. (See Plt.'s Ex. 10, 2018 ME 142)

On January 28, 2019, Winchester filed with the court Petitions for Post- Conviction Review on each of the six dockets, alleging ineffective assistance of counsel. No amended petition has been filed by Winchester's counsel. Each of the six petitions make the same argument of ineffective assistance of counsel. Winchester asserts Attorney Plourde failed to



make a motion for speedy trial and to preserve evidence, and that he made only a “generic” motion to suppress. As to Attorney Prendergast, Winchester asserts counsel failed to follow up on prior motions filed, failed to preserve his right to speedy trial, and failed to properly prepare for hearings. And as to Attorney Tebbetts, Winchester asserts he too failed to preserve or argue his rights to speedy trial and failed to preserve or inspect evidence.

### ISSUES IDENTIFIED AT HEARING

At hearing, Winchester testified to his perceived grievances with each of his attorneys. Although it is clear Winchester possesses knowledge of a lot of details to his many cases, and presents a great ability to recite things such as dates and docket numbers, the court had some difficulty following his testimony. In short, the court finds Winchester less than credible or reliable when discussing his perceived failures by his attorneys. With the benefit of Winchester’s counsel outlining the issues complained of, the following are the court’s understanding of Winchester’s complaints regarding his attorneys:

- Evidentiary

- Motions to suppress not properly addressed, and in CR-2015-003, not completed

- Failed to preserve the evidence

- Failed to issue subpoenas on individuals the items were returned to

- Speedy Trial

- Right to speedy trial not requested or preserved

- Conditional Plea

- Inaccurate recitation of facts

Facts recited did not match with subpoenas

- Appeal

Insufficient record, did not include subpoenas

Failed to address speedy trial and plain view doctrine

Was denied opportunity to provide input

### STANDARD OF REVIEW

Claims of ineffective assistance of counsel raised on post-conviction review are governed by the two -part test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). Applying that test, a petitioner bears the burden, at the post-conviction trial, of proving the following: (1) counsel's representation fell below an objective standard of reasonableness, and (2) the deficient representation resulted in prejudice. *Philbrook v. State*, 2017 ME 162, ¶ 6.

As to the first prong of the test, counsel's representation falls below the objective standard of reasonableness if it falls below what might be expected from an ordinary fallible attorney. *Philbrook*, ¶ 7. Judicial inquiry into the effectiveness is highly deferential, and the post-conviction court must make every effort to eliminate the distorting effects of hindsight. *Id.* In *Roberts v. State of Maine*, 2014 ME 125, ¶23, 103 A.3d 1031, 1039, the Law Court indicated that in order to prove that counsel's performance was constitutionally deficient,

"a defendant must show that counsel's representation fell below an objective standard of reasonableness. The question is whether the counsel's performance fell within the wide range of reasonable professional assistance that a competent criminal defense counsel could provide under prevailing professional norms. The *Strickland* test compels us to reconstruct the circumstances of counsel's challenged conduct and to evaluate the

conduct from counsel's perspective at the time." (Internal citations and punctuation omitted.)

In the context of a plea the requirement of effective assistance of counsel is to ensure that the advice of counsel is within the realm of an ordinary competent attorney because the voluntariness of the plea hinges upon whether the advice is that of an ordinary competent attorney. *Aldus v. State*, 2000 ME 47, ¶15. The inquiry is whether the plea proceeding produced a just result which is "the knowing and voluntary entry of a guilty plea by a guilty party." *Id.*

As to the second prong, whether prejudice is established, a petitioner must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, meaning that the ineffective assistance of counsel rose to the level of compromising the reliability of the conviction and undermining confidence in it. *Philbrook*, ¶ 8; citing *Theriault v. State*, 2015 ME 137, ¶¶ 19, 25. A conviction may be unreliable and not worthy of confidence, thus satisfying the reasonable probability test, even without proof that a different outcome was "more likely than not", as the now superseded "outcome determinative" test would require. *Id.* The "reasonable probability" test is different from an "outcome-determinative" standard, which is the quantitative inquiry that would require proof "that counsel's deficient conduct more likely than not altered the outcome in the case." *Theriault*, ¶20. Rather, the court's analysis must be qualitative in nature-that is to determine whether the petitioner has demonstrated that trial counsel's performance undermines confidence in the outcome of the case and renders that outcome unreliable. *Theriault*, ¶19. "...the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Theriault*, ¶20, citing *Strickland*, 466 U.S., at 694.

## DISCUSSION

Before addressing Winchester's claims in detail, the court feels it would be helpful to again consider all of Winchester's cases globally. In 2014 and early 2015, the State initiated eight different prosecutions against Winchester, each involving felony level theft and/or burglary. Attorney Plourde was assigned counsel on all but one of the dockets. One of the earliest in time cases, CR-2014-147, which was a charge of burglary, started with a complaint being filed on March 31, 2014. No evidentiary motions were filed, and the case went to trial on November 14, 2014. That trial ended in a mistrial. A second trial was held on January 23, 2015, and a guilty verdict was returned. In February, 2015 Winchester was sentenced to five years, with all but three years suspended. Following sentencing, Winchester timely appealed, and also attempted to appeal his sentence. His appeals were denied, and a Memorandum of Decision was issued October 27, 2015. In summary, Winchester's first of eight cases went from complaint to verdict, including a mistrial, within ten months.

Although Winchester was held without bail as of November 10, 2014 on docket CR-2014-267 due to new criminal conduct, he officially went into execution of the three year sentence on CR-2014-147 in February, 2015. It was soon after trial and sentencing on his first trial that Attorney Plourde withdrew. Attorney Prendergast was appointed on April 28, 2015. The court infers this resulted in the transfer of the six remaining cases, and that some time was required for new counsel to become familiar with the cases and issues presented.

With Attorney Prendergast's entrance to the cases, litigation focused on the evidentiary issues related to the State's return to the owners of the items seized during multiple searches.

Although Attorney Plourde had previously filed a generic motion to suppress in dockets CR-2014-515 and CR-2015-003 related to the scope and specificity of the warrants, Attorney Prendergast's motions to suppress were more narrowly focused on due process issues related to the items being returned to the owners. Motions were filed on each docket on August 3, 2015. Per the docket sheets, hearings were scheduled on several dates, but for reasons unclear from the files, hearing was not held until July 20, 2016. Decisions were issued by the court on October 27, 2016.

In other words, from August 3, 2015 through October 27, 2016, over a period of 13 months, all of the cases were embroiled in litigation regarding the return to the owners the evidentiary items seized by police. It is clear this was an extremely important issue to Winchester, and one that he wanted to litigate. And from review of the files and record, those due process issues were addressed and ruled upon. That Winchester did not get the result he desired is not indicative of lack of quality effort or effectiveness by his counsel. More to the point, Winchester's goals may not have been realistic. During the hearing on this petition, on multiple times Winchester stated he kept asking Attorney Prendergast to do something *"..to get my property returned.."* and *".. I wanted my property back.."*. The court finds it incredulous that Winchester could expect this court to believe that with the multiple theft charges pending, that any attorney could achieve a ruling that resulted in turning the fruits of the thefts into the hands of the suspect.

Per the docket sheets, the next docket call held after the October 27, 2016 orders were issued was on February 27, 2017. Per Justice Hunter's Supplemental Order dated March 1, 2017, the court was attempting to expose one of Winchester's case for trial, particularly Docket CR-2015-067. But Winchester still wanted to litigate the evidentiary issue of the scope and

specificity of the search warrants that he felt were not addressed in the October 27, 2016 orders. So, on that same date, Winchester moved for reconsideration. On the same date, the court denied the motions for reconsideration on the basis the items seized were in plain view or seized with consent. Telling is the assessment shared by Justice Hunter in his Supplemental Order, “*..that the court was not going to allow the Defendant to attempt to control the court’s docket..*” by “firing” Attorney Prendergast.

However, per the motion to withdraw filed by Attorney Prendergast on March 17, 2017, the attorney-client relationship remained strained. The motion was granted and Attorney Coleman was appointed on April 12, 2017. This second change in counsel would again logically result in additional time for new counsel to obtain the files and become familiar with the issues. And with new counsel, Winchester still wanted to address the search warrant issues. On July 5, 2017, motions for further findings were filed on all dockets. In response, on August 23, 2017, the court issued yet another order on each of the dockets. These orders addressed whether the items seized were either within the scope of the warrants, in plain view, or seized with consent, and with respect to some items ruled the issue had been waived. In summary, the court issued orders addressing evidentiary issues related to the seized items on four different dates-October 27, 2016, February 27, 2017, March 1, 2017, and August 23, 2017.

At about the same time the last order was being issued, Attorney Coleman withdrew, and was replaced by his associate, Attorney Tebbetts. And within just a couple months, on November 9, 2017, Winchester had his second jury trial, on docket CR- 2014-545. This case pertained to the theft of tires and rims. Notwithstanding Winchester’s complaint about how the suppression issues were handled, the court’s Order on Motion for Reconsideration dated August 23, 2017 on this specific docket reveals a different assessment. In the order specific to this docket, the court

wrote a significant amount of detail that the rims and tires were observed in plain view, identified by the true owner, and seized with consent. Although counsel may not have briefed and argued a search warrant issue as Winchester demanded, the order by the court implies there was no search warrant issue to address.

Accordingly, that matter proceeded to trial on November 9, 2017, and Winchester was again found guilty. At this point, Winchester had been found guilty on two of the original dockets, both at Class C levels, and a third trial was being set for the next month.

The next case that was to proceed to trial in December, 2017 was docket CR-2014-267. Similar to the others, this case involved a burglary and theft of a compound saw. But with this case, according to the testimony at hearing, the State had DNA evidence linking Winchester to the scene.<sup>5</sup> This prompted Attorney Tebbetts to prepare and review with Winchester a risk analysis of proceeding to trial in light of the DNA evidence and also the sentencing implications if found guilty, what would be his third felony conviction from this theft and burglary spree. (See Def.'s Ex. 1). Although Winchester initially refused the offers, the following day he decided to accept them. On December 6, 2017, Winchester entered conditional pleas of no contest to all remaining charges, reserving his rights of appeal with respect to speedy trial and the evidentiary matters that had previously been litigated. However, at the Rule 11 hearing Attorney Tebbetts stated on the record that the issue of speedy trial may not be ripe for appeal. (See Plt.'s Ex.'s 2 and 3). At hearing Attorney Tebbetts further explained that since no requests for speedy trial

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<sup>5</sup> This is the docket that Winchester was being held without bail after his release from prison in May, 2017 due to a motion to revoke bail filed November 10, 2014 based on new criminal conduct. At hearing Winchester testified that because he was being held without bail on only this docket, he was pressing Attorney Prendergast to get this docket to trial. Attorney Prendergast testified that to prepare and be ready for trial, he needed to have the DNA evidence reviewed by their own expert, a process that took some amount of time. The court finds Attorney Prendergast's judgment and decisions to have the DNA evidence reviewed by an expert to be valid and reasonable. And this case, like the others, was subject to the motion hearings regarding the seized items being returned to the owners. The court does not find credible Winchester's assertion that he did not want this docket included in the evidentiary hearings.

could be found in any of the dockets, he believed the better avenue to address the issue was by post-conviction review.

Looking at the litigation of these several dockets collectively, the court cannot discern where any of the involved counsel's representation fell below an objective level of reasonableness, or that counsel's representation undermines confidence in the outcome rendering it unreliable, and hence prejudicial. See *Philbrook v. State*, 2017 ME 162, ¶ 6, *Theriacault v. State*, 2015 ME 137, ¶ 19. However, the court will now specifically address the deficiencies Winchester alleges.

1. Failure to preserve evidence.

This complaint is unpersuasive. A review of the six dockets that are subject to the petition show that counsel initiated motions and discovery sanctions for the State's return to the owners the evidence and items seized by law enforcement through their investigations. A hearing was held, and the court issued detailed orders on each case. Counsel appropriately identified, and reasonably argued the issue. That the court did not agree with the motion and arguments made does not mean that counsel's conduct was ineffective or fell below an objective reasonable standard. The court finds that Winchester has failed to prove counsel's representation fell below an objective standard of reasonableness. Winchester's assertion that his counsel failed to make every argument or raise every issue he insisted upon is misplaced, and is not the test. As previously indicated, the court finds Winchester's demands that counsel take action to have "*my property*" returned to him incredulous. The court finds that the action taken by counsel challenging the return of seized items to the owners was handled appropriately, even if unsuccessful.



Winchester's complaints regarding a failure to issue subpoenas seems linked to the issue of failure to preserve evidence. As best can be understood from Winchester's testimony, he apparently next demanded counsel serve subpoenas on the owners of the property. Issuance of subpoenas on the victims to bring the items to trial, or even for inspection, would be reasonable, and it seems Attorney Prendergast did initiate those subpoenas for potential trials in December, 2016<sup>6</sup>. (See Plt.'s Ex. 4). But Winchester is again mistaken if his demands for issuance of a subpoena were for the purpose of having the items "returned to his possession". Otherwise, issuance of subpoenas for trial or for inspection is something that could have been done, if necessary, on any of the dockets right up to and through trial of each case. The lack of subpoena is not at issue in the two cases that went to trial. And Winchester plead on the other cases before going to trial. The court finds that Winchester has failed to prove counsel's conduct regarding the issuance of subpoenas fell below an objective standard of reasonableness. Additionally, he has not proven prejudice, particularly as he plead out the remaining cases before trial.

## 2. Motions to suppress

In essence, Winchester asserts that counsel were deficient for not doing more to challenge the scope of the search warrants and the seizure of items of property. First of all, counsel's decision not to file certain motions in defiance of a client's request does not render the inaction ineffective. Attorneys remain with the appropriate level of professional judgment. In this case, Attorney Plourde did file motions to suppress in dockets CR-2014-515 and CR-2015-003. Otherwise, the motions filed by Attorney Prendergast on August 3, 2015 raised a number of issues regarding the items seized by the police through their investigations. But ultimately, the

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<sup>6</sup> Pursuant to a subpoena issued by Attorney Prendergast, one or more of the victims did in fact come to court with the item(s) in question providing Winchester an opportunity to inspect the item, but the cases did not go to trial at that time.

hearing and decision focused on the due process issue related to the return of the seized items to the owners. As previously discussed, counsel handled this issue reasonably, notwithstanding that the court denied the motions via its October 27, 2016 orders. But counsel did not simply abandon the search and seizure issues as Winchester alleges. On February 27, 2017, Attorney Prendergast filed motions for reconsideration in each of the dockets specifically raising the specificity of the warrants. On the same day, the court denied the motion on the basis of plain view and consent. And on July 5, 2017 counsel again filed motions following up on the October 27, 2016 orders, when Attorney Coleman filed Motions for Further Findings, notably addressing the scope or specificity of the search warrants. Winchester is correct that counsel did not file proposed findings or conclusions. But the court still issued rather detailed orders on each of the dockets addressing specifically the item seized in each case, and whether it was addressed in the warrant, or seized pursuant to plain view or consent.

Because the issues related to the scope of the warrants or the basis of the seizures was not subject to an actual evidentiary hearing, on this limited issue the court will accept for discussion purposes that representation may have fallen below an objective standard of reasonableness, the first prong of *Strickland*. Winchester must still prove the deficient representation resulted in prejudice. *Philbrook*, 2017 ME 162, ¶ 6. As previously discussed, whether prejudice is established, a petitioner must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, meaning that the ineffective assistance of counsel rose to the level of compromising the reliability of the conviction and undermining confidence in it. *Philbrook*, ¶ 8; citing *Theriault v. State*, 2015 ME 137, ¶¶ 19, 25. A conviction may be unreliable and not worthy of confidence, thus satisfying the reasonable probability test, even without proof that a different outcome was "more likely than

not”, as the now superseded “outcome determinative” test would require. *Id.* The court’s analysis must be qualitative in nature—that is to determine whether the petitioner has demonstrated that trial counsel’s performance undermines confidence in the outcome of the case and renders that outcome unreliable. *Theriault*, ¶19.

The larger evidentiary issue in these cases was the return to the owners the items of property seized by the police. As already discussed, counsel reasonably and effectively identified and litigated that issue in each case. *How* the police found and seized the items was more straightforward. As detailed by the court in both the February 27, 2017 and August 23, 2017 orders entered, the items were seized by police pursuant to plain view or with consent. There is nothing about counsel’s conduct that undermines confidence in the outcome of these cases that renders those outcomes unreliable.

### 3. Appeal

Winchester’s complaints regarding the appeal also fail. There would be no grounds or basis to include in the record of appeal copies of subpoenas served on the victims, as there was no evidentiary, factual or legal issues presented at hearing or trial regarding them. As for not raising the speedy trial on appeal, counsel explained that without proof that a request for speedy trial had been made, he felt it may have not been ripe and may have been more suited for post conviction review. The court will address the speedy trial issue in detail, *infra*. Otherwise, counsel’s conduct in prosecuting the appeal in all aspects appears entirely reasonable from an objective basis. (See Plt.’s Ex.’s 7, 8, 9 and 11).

### 4. Conditional Plea

Winchester made a plea of no contest. Winchester’s argument that the recitation of facts by the State was not accurate is baseless, plus he did not object to that recitation at hearing. For a

plea, the test is whether the advice of counsel is within the realm of an ordinary competent attorney because the voluntariness of the plea hinges upon whether the advice is that of an ordinary competent attorney. *Aldus v. State*, 2000 ME 47, ¶15. The inquiry is whether the plea proceeding produced a just result which is “the knowing and voluntary entry of a guilty plea by a guilty party.” *Id.* After having been found guilty at two different trials of felony level theft, counsel achieved a very good result that involved Winchester making conditional pleas, preserving his rights of appeal, and limiting his exposure of prison time. Accordingly, Winchester has failed to prove any deficiencies in counsel’s conduct related to the conditional pleas.

#### 5. Speedy Trial

With respect to Winchester being denied his right to a speedy trial, the court is left to conclude that factually, no request for speedy trial was made. Confusion related to this issue was created however by the handwritten letter exchanged between Winchester and a clerk with court. By a letter dated April 12, 2015, Winchester inquired whether Attorney Plourde had filed a motion for speedy trial and motion to suppress. (See Plt.’s Ex. 1) A clerk with initials “CMH” responded in a handwritten note “Mr. Plourde has in fact filed the motions.” *Id.* That response was in error, as pursuant to a review of the files on all dockets, a motion for speedy trial had not been made. But that does not end the analysis.

The right of an accused to a speedy trial is guaranteed by both the state and federal constitutions. *State v. Carisio*, 552 A.2d 23, 26 (Me. 1988) citing Me. Const. art. I, § 6; U.S. Const. amend. VI. Whether an accused has been denied his right to a speedy trial can be determined only through the use of a delicate balancing test that takes into account all of the circumstances of the case at hand. *State v. Murphy*, 496 A.2d 623, 627 (Me. 1985). In *Barker v.*

*Wingo*, 407 U.S. 514, 530-533, 33 L. Ed. 2d 101, 92 S.Ct. 2182 (1972), the Supreme Court indicated four factors to be considered in evaluating an alleged denial of the right to a speedy trial: the length of delay, the reasons for delay, the assertion of his right, and prejudice to the defendant arising out of the delay. *Id.* The *Barker* analysis is necessary, however, only when the length of the delay is so presumptively prejudicial as to warrant consideration of the three remaining factors in the balancing process. *State v. Willoughby*, 507 A.2d 1060, 1064 (Me. 1986). The length of delay of the second trial in this case held in November, 2017, is arguably sufficient to warrant the *Barker* analysis. *State v. Murphy*, 496 A.2d 623, 627 (Me. 1985) (25 months delay); *State v. Smith*, 400 A.2d 749, 752 (Me. 1979) (25 month delay); *State v. Rippy*, 626 A.2d 334, 339 (Me. 1993) (nineteen-month delay was enough to raise presumption that such delay was unnecessary); *State v. Michaud*, 590 A.2d 538, 540 (Me. 1991) (thirty-two month delay not *per se* violation).

Before addressing the *Barker* analysis, the court will first consider Attorney Plourde's conduct, as it is whether he had filed a speedy trial request that the confusion with the clerk developed. Attorney Plourde's representation of Winchester began on March 31, 2014, when he was appointed counsel on docket CR-2014-147. He was subsequently appointed on the additional dockets as each case was filed. Attorney Plourde got docket CR-2014-147 to its first trial in November, 2014, which resulted in a mistrial. It was tried to conclusion and a guilty verdict in January, 2015. In other words, his first case was tried within ten months, well within the threshold for consideration of a speedy trial violation. And certainly, only one case could be tried at a time or risk prejudicing the defendant before the jury.

Attorney Plourde withdrew from representation of all cases on April 3, 2015, just a year since his appointment on the earliest of cases. So, Attorney Plourde's failure to file requests for

speedy trial prior to his withdrawal, while also recognizing he had already gotten one of the first cases to trial, does not fall below the objective standard of reasonableness of what is expected of an ordinary fallible attorney.

After Attorney Plourde's representation, it is undisputed that requests for speedy trial were never filed. So, the court will now conduct the *Barker* analysis and consider the reasons for delay, and prejudice to the defendant arising out of the delay.

There are several things that contributed to the delay. The largest delay was attributable to the litigation related to the motions filed regarding the return of seized items to the owners. The motions raised important issues that needed to be resolved. The motions were filed August 3, 2015, and decided by the court on October 27, 2016. The court does not know why these motions took 15 months to be resolved, and agrees that seems excessive. But in no way does it appear it was due to fault of the State.

The next largest cause of delay is attributable to the changes in counsel. The first change occurred in April, 2015 when Attorney Plourde withdrew and Attorney Prendergast was appointed. The next change occurred in March, 2017 when Attorney Prendergast moved a second time to withdraw. This change in counsel is, at least to some degree, attributable to Winchester, and appears related to Attorney Prendergast's refusal to take positions demanded by Winchester that he did not agree with. The court has already discussed Justice Hunter's perception of the situation as written in his Supplemental Order dated March 1, 2017 in docket CR- 2015-067, and his view that Winchester was attempting to control the docket. What is also gleaned from the Supplemental Order dated March 1, 2017 is the court was diligently trying to expose one of Winchester's cases for trial, but those efforts were derailed by Winchester's

conflict with his attorney and his position that Attorney Prendergast no longer represent him. (See Motion to Withdraw dated March 17, 2017 filed in all dockets).

Although not immediately quantifiable, a change in counsel logically causes delay, as it requires a new appointment by the court, the transfer of files, time for new counsel to become familiar with the file materials and issues, and time for counsel to meet with the new client.<sup>7</sup>

Additionally, upon appointment of Attorney Coleman, the search warrant issues were revisited by the motion for further findings filed on July 5, 2017 in all dockets. Those motions were decided by the court on August 23, 2017. (See orders dated August 23, 2017 in all dockets) The next case then went to trial a little over two months later, in November, 2017. In summary, the delay was associated with the motions to suppress and motion for further findings, all filed by the defense, and the changes in counsel, also initiated by the defense. These factors weigh heavily against the assertion of a speedy trial violation.

As for prejudice, the court recognizes that any delay potentially prejudices a defendant. But a significant portion of the delay was attributable to litigation of the motions filed by the defendant. Having those motions ruled on by the court counters any prejudice as it would have been more prejudicial to proceed to trial without rulings. Similarly, it could have potentially been more prejudicial to require Winchester to proceed to trial with an attorney representing him that he was in conflict with and wanting to fire. Finally, the court remains struck by the volume of these cases. As discussed already, there were originally eight dockets, all involving a felony theft and/or burglary. One of the earliest cases was tried within ten months, and then the remaining dockets became mired in the motion litigation and change of counsel. Through that time

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<sup>7</sup> There was a third change in counsel when Attorney Coleman withdrew and Attorney Tebbetts was appointed. But this change in counsel does not appear to have resulted in much delay, likely due to the attorneys being from the same office.

Winchester was largely in execution of a three year sentence on the first case that went to trial. The second trial of the eight original dockets was tried within just a few months of his release from prison.

Again, any delay is potentially prejudicial. But in conducting the *Barker* analysis, and considering the overall time, the primary causes of delay, and the minimal prejudicial impact, the court does not discern a speedy trial violation. In considering those factors, and in considering what each of the attorneys did do for professional representation within each of their periods of representation, the court finds that although none of the attorneys filed a request for speedy trial, Winchester has failed to establish that his attorneys conduct fell below the objective standard of reasonableness of what is expected of an ordinary fallible attorney, and also failed to prove that it resulted in prejudice. *Philbrook*, 2017 ME 162, ¶ 6.

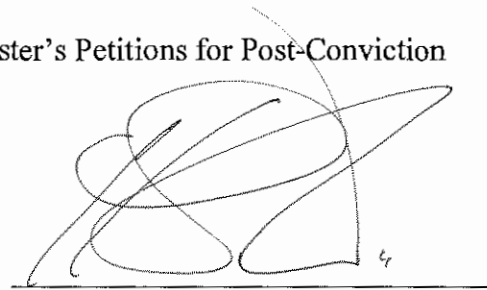
Looking at the result of these cases globally, or looking at the particular instances of conduct, or non-conduct, by the attorneys that Winchester complains of, the court comes to the same result. There is nothing about the conduct of any of the involved attorneys that fell below an objective standard of reasonableness, or that fell below what might be expected of an ordinary fallible attorney. *Philbrook*, 2017 ME 162, ¶6,7. And the court is even more moved when considering the second prong of the *Strickland* test- whether the deficient representation (if any) resulted in prejudice, meaning whether counsel's performance undermines confidence in the outcome of the cases and renders the outcome unreliable. *Theriacault*, 2015 ME 137, ¶ 19. From this spree of theft and burglaries, there were eight dockets of felony level charges. Of these eight, one was dismissed; two were tried to verdict, and six were the subject of extensive motion litigation. Just prior to going to a third trial, which if found guilty would result in potentially significant prison time, counsel achieved an extremely favorable plea bargain that reserved



appeal rights and minimized his prison exposure. And Winchester's cases received two reviews at the appellate level. (See Decision No. Mem. 15-82 on CR-2014-147, and Plt.'s Ex. 10. Law Court Decision 2018 ME 142 on CR-2014-545). Whether looking at the specific conduct or non-conduct complained of by Winchester, or looking at the cases as a whole, Winchester has failed to prove that (1) counsel's representation fell below an objective standard of reasonableness, and (2) the deficient representation resulted in prejudice. *Philbrook*, 2017 ME 162, ¶ 6.

The order of the court is: Petitioner Dennis Winchester's Petitions for Post-Conviction Review are all DENIED.

Dated: 7/26/, 2021

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a horizontal line.

Justice, Superior Court